PUBLIC COPY

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

U.S. Department of Homeland Security

Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 I Street, N.W.
Washington, DC 20536

[redacted]

FEB 06 2004

FILE: WAC-02-119-52211 OFFICE: CALIFORNIA SERVICE CENTER DATE:

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

IN BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of Citizenship and Immigration Services (CIS) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is an employment services and placement company that seeks to employ the beneficiary as an utilization review coordinator. The petitioner, therefore, endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101 (a)(15)(H)(i)(b).

The director denied the petition because the petitioner did not submit sufficient evidence to establish it would be the employer or the agent of the beneficiary. On appeal, counsel submits a brief and additional evidence.

Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides for the classification of qualified nonimmigrant aliens who are coming temporarily to the United States to perform services in a specialty occupation.

Pursuant to 8 C.F.R. § 214.2(h)(4)(ii), *United States employer* means a person, firm, corporation, contractor, or other association, or organization in the United States which:

> *(1)* Engages a person to work within the United States;
>
> *(2)* Has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee;
>
> *(3)* Has an Internal Revenue Service Tax identification number.

Further, under 8 C.F.R. § 214.2(h)(2)(i)(F) the term *agent* is discussed and the section states that:

> A United States agent may file a petition in cases involving workers who are traditionally self-employed or workers who use agents to arrange short-term employment on their behalf with numerous employers, and in cases where a foreign employer authorizes the agent to act on its behalf. A United States agent may be: the actual employer of the beneficiary, the representative of both the employer and the beneficiary, or, a person or entity authorized by the employer to act for, or in place of, the employer as its agent. A petition filed by a United States agent is subject to the following conditions:

> (1) An agent performing the function of an employer must guarantee the wages and other terms and conditions of employment by contractual agreement with the beneficiary or beneficiaries of the petition. The agent/employer must also provide an itinerary of definite employment and information on any other services planned for the period of time requested.
>
> (2) A person or company in business as an agent may file the H petition involving multiple employers as the representative of both the employers and the beneficiary or beneficiaries if the supporting documentation includes a complete itinerary of services or engagements. The itinerary shall specify the dates of each service or engagement, the names and addresses of the actual employers, and the names and addresses of the establishment, venues, or locations where the services will be performed. In questionable cases, a contract between the employers and the beneficiary or beneficiaries may be required. The burden is on the agent to explain the terms and conditions of employment and to provide any required documentation.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for additional evidence; (3) the petitioner's response to the director's request; (4) the director's denial letter; and (5) Form I-290B and supporting documentation. The AAO reviewed the record in its entirely before issuing its decision.

The petitioner is seeking the beneficiary's services as an utilization review coordinator. Evidence of the beneficiary's duties in the record includes: the I-129 petition; the petitioner's document entitled "Detailed Description of the Position's Tasks and Duties"; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail: analyzing patients' records; reviewing policies and procedures; ordering, interpreting and evaluating diagnostic tests to identify and assess patients' conditions; handling reimbursement for services; and collecting data to assess and evaluate the Utilization Management Program. The petitioner indicated that a qualified candidate for the job would possess a bachelor's degree in any health care field.

The director denied the petition because the petitioner did not submit sufficient evidence to establish it would be the employer or the agent of the beneficiary.

On appeal, counsel states that the petitioner had submitted sufficient evidence to establish that the petitioner would be considered the beneficiary's employer upon approval of the H-1B visa petition. In addition, counsel states that, in the petitioner's response to the request for evidence, the Immigration and Naturalization Service (the Service), now Citizenship and Immigration Services (CIS), had been informed that the beneficiary would have only one employer and would perform services at one location. Consequently, the petitioner did not submit an itinerary of services with names and addresses of additional employers. Counsel also claims that the Employment Agreement is not vague because it specifies the effective dates of employment (April 1, 2002 to March 31, 2005) and includes a list of the position's tasks and duties. Finally, counsel contends that the Employment Agreement between the petitioner and Robilyn Guest House is legally binding.

According to the evidence in the record, the petitioning entity does not satisfy the definition of a United States employer as defined at 8 C.F.R. § 214.2(h)(4)(ii).

The documentary evidence contained in the record reveals that, in response to the request for evidence, the petitioner submitted a document, executed on February 5, 2002, between the petitioner and Robilyn Guest House, entitled "Agreement"; and on appeal, counsel submits an amended Agreement, executed on November 4, 2002, by the same parties, and a document entitled "California Subscriber Service Agreement, executed on October 4, 2002, again by the same parties.

Citizenship and Immigration Services (CIS) regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. 103.2(b)(12). Any facts that come into being subsequent to the filing of a petition, which had been filed on February 15, 2002, cannot be considered when determining whether the petitioner qualifies as an employer. *See Matter of Michelin Tire*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). Thus, in determining whether the petitioning entity satisfies the definition of an employer, the AAO will consider only the initial Agreement that had been submitted with the I-129 petition, given that the subsequently submitted evidence had been executed, and therefore came into being, after the filing of the petition.

Whether the petitioner is considered a United States employer turns on the Agreement's language. The Agreement states that the petitioner would be known as the "job placement agency" and Robilyn Guest Home would be known as the "employer," and the Agreement

states that the employer agrees to:

> engage the services of the job placement agency to find, pre-qualify, interview, evaluate, and process the application and other pertinent employment and legal document of the applicant for the purpose of lawful, gainful and equitable employment.

The Agreement further states that the employer agrees to hire the beneficiary for the position of utilization review coordinator after the completion of document processing. In the Agreement, the employer guarantees the continuous employment of the beneficiary from April 1, 2002 to March 31, 2005; specifies the hourly salary that would be paid; indicates the job location; and states "for [its] services, the job placement agency shall be compensated by the employer the amount of equivalent to one month['s] salary."

The language of the Agreement refutes counsel's assertion that the petitioning entity would be the beneficiary's employer. First, the language in the Agreement plainly states that the employer, Robilyn Guest Home, would hire the beneficiary and pay the beneficiary's salary; this undermines counsel's assertion that the petitioner would have the sole responsibility to hire and compensate the employee. Second, the explicit language of the Agreement, that the petitioner would be known as the "job placement agency" and Robilyn Guest Home as the "employer," reveals that the petitioning entity serves as a placement agency, not an employer. Third, the language in the Agreement, that the job placement agency shall be compensated in the amount equivalent to one month's salary for its services, obviously implies that the petitioning entity functions as a placement agency that receives a fixed fee for its services, and that the petitioning entity would relinquish all control over and responsibility for the beneficiary following the beneficiary's placement with a company. Thus, the petitioner would not hire, pay, fire, supervise, or otherwise control the work of the beneficiary.

It is important to note that the language of the initial Agreement, executed on February 5, 2002, and the amended Agreement, executed on November 4, 2002, differs significantly. For example, the initial Agreement states that the "employer" is Robilyn Guest House and the petitioner is the "job placement agency." Whereas, the amended Agreement states that the job placement agency (the petitioning entity), will now be known as the "employer," and Robilyn Guest Home as the "subscriber." Another example is that the initial Agreement states that Robilyn Guest House will hire the beneficiary and pay the beneficiary's salary. Whereas the amended Agreement provides that, not only will the petitioning entity pay the beneficiary's salary, but should the need arise, "effect the termination of the employment of the employee for cause."

Given such profound differences between the two Agreements, doubt

cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Consequently, the evidentiary value of all evidence contained in the record is highly questionable.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed. The petition is denied.